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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. EUSEBIO BANUELOS, Defendant and Appellant.	B266248 (Los Angeles County Super. Ct. No. SA017369)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill and Timothy L.

O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

In 1994, the trial court, pursuant to the "Three Strikes" law (Pen. Code, § 667, subd. (e)(2)(A)[1]) sentenced defendant Eusebio Banuelos (Banuelos) to an indeterminate term of 25 years to life in prison. In 2013, Banuelos filed a petition for recall of sentence pursuant to Proposition 36 (§ 1170.126) (the petition). In 2015, the court denied the petition and Banuelos's subsequent motion for reconsideration (the motion).

On appeal, Banuelos advances three arguments. First, he contends that the orders denying the petition and the motion should be reversed because the trial court used the wrong definition of "unreasonable risk of danger to public safety." Specifically, Banuelos argues that the trial court should have used the restrictive definition of "unreasonable risk of danger to public safety" found in Proposition 47 (§ 1170.18). According to Banuelos, because Proposition 47 says, "[*a*]s *used throughout this Code*, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony" (§ 1170.18, subd. (c), italics added), Proposition 47 imports its definition of "unreasonable risk of danger to public safety" into the entire Penal Code, including, as relevant here, into

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Proposition 36 resentencing determinations. As a result, Banuelos argues that the matter should be remanded to the trial court with instructions to either grant the petition or reconsider it under Proposition 47's definition of dangerousness. In the alternative, Banuelos argues that under any definition of that term, he did not pose such a risk. Finally, Banuelos maintains reversal is required because his counsel was ineffective.

We disagree with all of Banuelos's arguments and, accordingly, affirm.

BACKGROUND

I. Banuelos's "strike" convictions

On April 28, 1982, in two consolidated cases—one for the robbery of a Lucky grocery store (§ 211); the other for an attempted robbery of an Albertson's grocery store (§§ 664/211), with both crimes involving the use of a firearm—the court sentenced Banuelos to prison terms of five years and four years, respectively, with the terms running concurrently. At the time, Banuelos was 19 years old.

On September 14, 1994, after a jury convicted Banuelos of driving a vehicle without consent (Veh. Code, § 10851, subd. (a)) and possession of stolen property (§ 496), the court imposed an indeterminate term of 25 years to life,

pursuant to the Three Strikes law.[2] At the time, Banuelos was 31 years old.

II. The petition

On or about March 1, 2013, Banuelos filed the petition. At the time, Banuelos was 50 years old and had served 18 years of his 25 years to life sentence.

On March 7, 2013, in response to the petition, the trial court ordered the People to show cause as to why relief should not be granted pursuant to section 1170.126.

On April 28 and May 7, 2015, the trial court held a hearing on Banuelos's suitability for resentencing pursuant to Proposition 36 (§ 1170.126, subd. (f), (g)). For its case in chief, the People did not call any witnesses, but instead introduced documentary evidence regarding Banuelos's criminal history and his prison disciplinary record. The People's evidence with regard to Banuelos's conduct while in prison showed 11 serious rules violations between 1994 and 2013. Six of those violations, which occurred between 1996 and 2004, concerned either the possession of drug paraphernalia, controlled substances, or inmate-manufactured alcohol. Two violations involved the threat or risk of violence—in 2003, Banuelos was found guilty of

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[2] After being released on parole in 1986, Banuelos suffered a number of other convictions before receiving his third "strike" conviction in 1994. Those convictions either involved taking a vehicle without consent (Veh. Code, § 10851, subd. (a)) or a drug-related crime (Health & Saf. Code, §§ 11350, subd. (a), 11550, subd. (a)).

conspiracy to commit battery on an inmate who owed him money; and in 2010, he pleaded guilty to possession of a deadly weapon (a razor blade). In 2007, Banuelos pleaded guilty to refusing a direct order. Finally, on two separate occasions—first in 2011 and again in 2013—Banuelos pleaded guilty to participating in a hunger strike while housed in Pelican Bay State Prison's Special Housing Unit (SHU).

In addition, the People introduced evidence showing that prison officials had determined in 2007 and again in 2012 that Banuelos was an active associate of the Mexican Mafia prison gang.

Finally, the People offered evidence regarding Banuelos's security risk scores as determined by the California Department of Corrections and Rehabilitation (CDCR). Under the CDCR's scoring system, the lower an inmate's CDCR classification score, the lower the perceived security risk and the more access an inmate has to programs and work opportunities. Points are added to an inmate's score for serious rules violations. An inmate can lower his or her score by not violating the rules for extended periods and by performing well in work, school, or vocational training. A score of 19 is the lowest an inmate can receive. As a life inmate, Banuelos would have a mandatory minimum score of 52. Between 1994 and 2014,Banuelos's classification score never fell below 60 and his June 2014 score was 104, which, at the time, was his highest score to date.

Banuelos attempted to rebut the People's evidence through the expert testimony of Richard Subia (Subia), a public safety consultant, who previously worked for the CDCR for 27 years, rising up from a correctional officer to acting director of the department. Subia opined that Banuelos would not "pose an unreasonable risk of danger to public safety if he were resentenced as a second striker."

Subia's opinion was based on several facts. First, while Banuelos may be affiliated with the Mexican Mafia prison gang, he is not a "shot caller" in that gang, noting that Banuelos had been stabbed several times in prison for drug debts, something that would not happen to a gang leader or "shot caller." Indeed, Subia opined that, given his drug habit, Banuelos had to be affiliated with the gang in order to secure access to illegal drugs. Second, Banuelos had not been accused of any violent behavior since 2003 and, with the possible exception of the hunger strikes, Banuelos had not participated in any gang behavior while in prison; according to Subia, Banuelos's participation in the state-wide SHU hunger strikes should be seen as an act of self-preservation, as he would have been in danger had he not participated. Moreover, Banuelos had been approved for a double cell, which indicated that prison officials did not regard Banuelos as being "assaultive" or exhibiting "predatory behavior." Third, while Subia conceded that Banuelos had "significant problems with substance abuse" both before and after being sent to prison, there was "nothing in his file to indicate that he ha[d] any current

issues with substance abuse." In fact, the last drug-related incident in Banuelos's file was from 2004, more than a decade ago.[3]

On May 21, 2105, in a written memorandum, the court denied the petition, finding that the preponderance of the evidence demonstrated that Banuelos poses an unreasonable risk of danger to public safety.

The trial court identified three principal reasons for denying the petition. First, there was the Banuelos's criminal history and substance abuse problems. As the court explained, all of Banuelos's convictions were related to "his need to buy and use illicit drugs." The court noted that Banuelos never completed probation or parole successfully and his criminal history is that of the "classic drug addict[ ], who commits property crimes to support his habit." "Because of the undeniable link between [Banuelos's] history of substance abuse and criminal behavior," the trial court noted that "it is not surprising that six of the eleven [serious rules violations] involve drugs or alcohol or drug paraphernalia."

Second, the court found Banuelos's continued involvement in and/or affiliation with prison gangs "very troubling." Despite his long incarceration, Banuelos never

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[3] The People did present a rebuttal witness, a Los Angeles County Sheriff's deputy assigned to the prison gang unit, however the trial court found the testimony of this witness "unreliable" due to the lack of any personal knowledge of Banuelos.

"repudiated his gang involvement or affiliation. In fact, as recently as 2012, prison staff discovered a birthday card sent to [Banuelos] from a fellow Mexican Mafia gang member with symbols showing allegiance to the gang. . . . [Banuelos] also currently maintains his gang tattoo as well."

Third, the court found it quite concerning that despite his long history of substance abuse, there was "no information in the record that [Banuelos] actually engaged in substance abuse programming" while in prison and "no indication at all that [Banuelos] will receive drug counseling, accountability or has in effect any relapse prevention plan."

III. The motion

On June 5, 2015, Banuelos filed his motion for reconsideration. The motion focused most centrally on the purported inadequacy of Banuelos's re-entry plan. Banuelos's counsel argued that he believed it was irrelevant to present evidence of a re-entry plan after the court allegedly stated in a tentative ruling in May 2014—almost a full year before the suitability hearing—that if Banuelos was released from jail, he would have to spend a year in a live-in drug treatment program. On June 23, 2015, Banuelos's counsel augmented the motion by submitting, inter alia, a letter from Cri Help accepting Banuelos into its residential drug treatment program.

On July 17, 2105, in a written decision the trial court denied the motion. The decision emphasized that the tentative ruling was not binding and that it "did not absolve counsel from presenting evidence as to permanent housing,

prevention of future drug addiction (which is often a lifelong battle) and family support after leaving transitional housing." Finally, it found that "even if counsel had presented testimony [regarding a post-release drug program] . . . this issue was not determinative of the Court's decision as re-entry plans are only relevant if [Banuelos] was first not found to pose an unreasonable risk of danger to public safety."

On August 6, 2015, Banuelos filed a timely notice of appeal challenging the denial of the petition and the motion.

DISCUSSION

I. Proposition 47's definition of "unreasonable risk of danger to public safety" does not apply to Proposition 36

A. Rules for the interpretation of voter initiatives

The first issue raised by Banuelos requires us to interpret Proposition 36 and Proposition 47. " 'In interpreting a voter initiative . . . we apply the same principles that govern statutory construction. [Citation.] Thus, "we turn first to the language of the statute, giving the words their ordinary meaning." [Citation.] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. [Citation.] When the language is ambiguous, "we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." [Citation.]' [Citation.] In other words, 'our primary purpose is to ascertain and effectuate

the intent of the voters who passed the initiative measure.' " (*People v. Briceno* (2004) 34 Cal.4th 451, 459.) When the language is not ambiguous, the plain meaning of the statutory language controls, unless it would lead to absurd results the electorate could not have intended. (*People v. Birkett* (1992) 21 Cal.4th 226, 231.) Furthermore, although courts may not generally rewrite a statute's unambiguous language, a word that has been erroneously used may be subject to judicial correction in order to "best carry out the intent of the adopting body." (*People v. Skinner* (1985) 39 Cal.3d 765, 775.) In short, we must " ' " 'select the construction that comports most closely with the apparent intent of the [voters], with a view toward promoting rather than defeating the general purpose of the statute.' " ' " (*Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140, 1146.)

B. Proposition 36

"Prior to its amendment by [Proposition 36], the Three Strikes law required that a defendant who had two or more prior convictions of violent or serious felonies receive a third strike sentence of a minimum of 25 years to life for any current felony conviction, even if the current offense was neither serious nor violent. (Former §§ 667, subds. (d), (e)(2)(A), 1170.12, subds. (b), (c)(2)(A).) [Proposition 36] amended the Three Strikes law with respect to defendants whose current conviction is for a felony that is neither serious nor violent. In that circumstance, unless an exception applies, the defendant is to receive a second strike sentence of twice the term otherwise provided for the current

felony, pursuant to the provisions that apply when a defendant has one prior conviction for a serious or violent felony." (*People v. Johnson* (2015) 61 Cal.4th 674, 680–681, fn. omitted.)

"[Proposition 36] also created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)" (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 168.)

In determining whether the petitioner would pose an unreasonable risk of danger to public safety, "the court may consider: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

Proposition 36 became effective on November 6, 2012. (See *People v. Brown* (2014) 230 Cal.App.4th 1502, 1507.) Under section 1170.126, a petition for resentencing must be filed within two years of Proposition 36's enactment "or at a

later date upon a showing of good cause . . . ." (§ 1170.126, subd. (b).)

C. Proposition 47

Two years and two days after enacting Proposition 36, the voters enacted Proposition 47. (§ 1170.18, (effective Nov. 5, 2014); see *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.)

Proposition 47 redesignates as misdemeanors "certain drug- and theft-related offenses" that were charged as felonies or charged as "wobblers" (that is, offenses that are punishable as a felony until a court reduces them to a misdemeanor) and ultimately sentenced as felonies.[4] (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) Among other things, Proposition 47 empowers "[a] person currently serving a sentence for a conviction" to "petition for a recall of sentence." (§ 1170.18, subd. (a).)

Similar to Proposition 36, a court evaluating whether to recall a sentence under Proposition 47 must assess (1) whether the petitioner is eligible for relief under Proposition 47, and (2) whether "resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) Although Proposition 47 urges a court to consider the same three types of evidence as Proposition

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[4] Proposition 47 redesignated as misdemeanors the crimes defined in Health and Safety Code sections 11350, 11357, and 11377 and in Penal Code sections 459.5, 473, 476a, 490.2, 496, and 666. (§ 1170.18, subd. (b).)

36 (*ibid.*, 1170.126, subd. (g)), Proposition 47 substantially narrows the scope of the court's inquiry into suitability. Specifically, Proposition 47 provides: "As used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of" subdivision (e)(2)(C)(iv) of section 667. (*Id.*, subd. (c).) In other words, rather than focus on whether the petitioner poses an "unreasonable risk of danger to public safety" generally, a court evaluating a Proposition 47 petition is to assess only whether there is an "unreasonable risk that the petitioner will commit" one of a handful of particularly egregious "violent" felonies that are often referred to super strikes.[5] (*Ibid.*)

D. Analysis

As a preliminary matter, we note that other appellate districts have considered whether Proposition 47's narrower

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[5] Those offenses include (1) a " 'sexually violent offense' " (Welf. & Inst. Code, § 6600), (2) oral copulation, sodomy, or sexual penetration with a child under the age of 14 when the defendant is 24 or older (Pen. Code, §§ 288a, 286, 289), (3) a lewd or lascivious act involving a child under the age of 14 (Pen. Code, § 288), (4) homicides and attempted homicides (Pen. Code, §§ 187–191.5), (5) soliciting murder (Pen. Code, § 653f), (6) assault with a machine gun on a peace officer or firefighter (Pen. Code, § 245), (7) possessing a weapon of mass destruction (Pen. Code, § 11418, subd. (a)), and (8) any other serious or violent felony punishable by life imprisonment or death. (§ 667, subd. (e)(2)(C)(iv).)

definition of "unreasonable risk of danger to public safety" applies to a Proposition 36 resentencing petition, have reached different opinions on this matter, and that the issue is currently pending before our Supreme Court.[6]

For the reasons that follow, we conclude that the voters erroneously used the word "Code" in section 1170.18, subdivision (c), rather than the word "Act," and that this error is properly subjected to judicial correction. Specifically, as we now discuss, we believe the voters intended in section 1170.18, subdivision (c) to refer to Proposition 47, not to the entire Penal Code. We therefore conclude that the passage of Proposition 47 did not alter Proposition 36 or section 1170.126.

First, other portions of Proposition 47's text strongly suggest that its definition of "unreasonable risk of danger to public safety" was not meant to extend beyond Proposition 47 itself. For example, subdivision (n) states: "Nothing in this and related sections is intended to diminish

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[6] See, e.g., *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted February 18, 2015, S223825 [Prop. 47's definition *does not* apply to Prop. 36 petitions]; *People v. Florez* (2016) 245 Cal.App.4th 1176, review granted June 8, 2016, S234168 [same]; *People v. Myers* (2016) 245 Cal.App.4th 794, review granted May 25, 2016, S233937 [same]; *People v. Lopez* (2015) 236 Cal.App.4th 518, review granted July 15, 2015, S227028 [same]; *People v. Cordova* (2016) 248 Cal.App.4th 543, review granted August 31, 2016, S236179 [Prop. 47's definition *does* apply to Prop. 36 petitions].)

or abrogate the finality of judgments in any case *not falling within the purview of this act*." (§ 1170.18, subd. (n), italics added.) However, if a court evaluating a Proposition 36 petition must grant that petition unless it finds a unreasonable risk that a defendant will commit a super strike (rather than a risk of danger to public safety more generally), the finality of that judgment is "diminished" by Proposition 47's definition.

Similarly, the wording of section 1170.18, subdivision (c) is also inconsistent with an intent to apply that subdivision throughout the entire Penal Code. Subdivision (c) refers to the "petitioner," a term that is used throughout Proposition 47 to refer to persons petitioning under "this section" or "this act." (See § 1170.18, subds. (a), (b), (c), (j), (1), (m).) Accordingly, subdivision (c)'s use of the term "petitioner" suggests that the term is limited to individuals petitioning under that particular act. (§ 1170.18, subd. (c).)

Second, the official title and summary, legal analysis, and arguments for and against Proposition 47 nowhere suggest that Proposition 47 will have an impact on Proposition 36. (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014) Prop. 47 (Voter Information Guide), <http://vigarchive.sos.ca.gov/2014/general/en/propositions/47/> (as of October 28, 2016.) The ballot materials do not, for example, say that Proposition 47 will severely restrict the ability of courts to reject resentencing petitions under Proposition 36. Neither the text of Proposition 47 nor its

ballot materials say anything about Proposition 36 or about exporting Proposition 47's newly minted definition of "unreasonable risk of danger to public safety" to other resentencing schemes. (§ 1170.18; Voter Information Guide, passim; see generally *People v. Mosley* (2015) 60 Cal.4th 1044, 1073 [looking to ballot summaries and arguments in assessing voters' intent].) Although Proposition 47 and Proposition 36 "are similar in structure and contain similar remedial resentencing provisions" (*People v. Rouse* (2016) 245 Cal.App.4th 292, 298; *People v. Rivas–Colon* (2015) 241 Cal.App.4th 444, 452, fn. 4), they have different goals and purposes. Proposition 47 is designed to give lower-level criminals who have committed "nonserious, nonviolent crimes like petty theft and drug possession" a reduced sentence. (Voter Information Guide, text of Prop. 47, § 3, subd. (3), at p. 70.) Proposition 36, in contrast, is designed to give hardened criminals with at least two prior serious or violent convictions a reduced sentence on their third felony (from 25 to life down to double the usual sentence). (§ 1170.126, subd. (f).) Proposition 47 was to be "liberally construed to effectuate its purpose." (Voter Information Guide, text of Prop. 47, § 18, at p. 74.)

Third, the timing of Proposition 47 is inconsistent with an intent to affect Proposition 36 petitions. Proposition 36 required defendants to file petitions within two years from its enactment absent a showing of good cause for a late petition. (§ 1170.126, subd. (b).) Proposition 47 was enacted with only two days remaining in the two-year period for

filing Proposition 36 petitions. A rational voter would not have understood Proposition 47 to change the rules for Proposition 36 petitions when the period for filing such petitions had almost expired unless there was some explanatory reference to Proposition 36. The ballot materials for Proposition 47 contain no such reference to Proposition 36. (Voter Information Guide, passim.)

On these grounds, we conclude that section 1170.18, subdivision (c) contains a drafting error—the use of the word "Code"—that must be judicially corrected to read "Act." As corrected, Proposition 47's definition of "unreasonable risk of danger to public safety" does not apply to Proposition 36. Accordingly, we hold that the trial court did not rely upon an incorrect definition of that term.

II. The trial court did not abuse its discretion in determining that Banuelos posed an "unreasonable risk of danger to public safety"

A. Standard of review

Section 1170.126 provides that the trial court must exercise its discretion to determine whether a petitioner would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).) "Where . . . a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125.) The "court

does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

B. No abuse of discretion in denying the petition

In its detailed memorandum of decision, the trial court considered each of the three categories of evidence outlined in Proposition 36;[7] weighed them; and ultimately concluded that Banuelos's criminal history, disciplinary history, continued gang affiliation, and absence of a "solid and reliable" re-entry plan meant that Banuelos posed an unreasonable risk of danger to public safety. Accordingly, we hold that the trial court did not abuse its discretion in denying the petition.

III. The trial court did not abuse its discretion in denying the motion

Motions for reconsideration must be based on "new or different facts, circumstances, or law." (Code Civ. Proc., § 1008, subd. (a)–(b).) "An abuse of discretion standard applies to a court's denial of a motion for reconsideration." (*Hudson v. County of Los Angeles* (2014) 232 Cal.App.4th 392, 408.)

Banuelos argues that the trial court abused its discretion by refusing "to re-open the matter to allow the

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[7] Those three categories are as follows: "criminal conviction history"; prison "disciplinary record"; and other evidence "relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

introduction of evidence of a re-entry plan." Banuelos's argument misses the point. There was no need to reconsider the petition in light of Banuelos's postpetition admission into a resident treatment program, because there was sufficient evidence based on Banuelos's criminal history, prison disciplinary history, CDCR risk scores, and continued gang affiliation for the trial court to find that Banuelos's resentencing posed an unreasonable risk to public safety without considering the existence of a treatment program. As the trial court explained, "even if counsel had presented testimony [regarding a post-release drug program] . . . this issue was not determinative of the Court's decision as reentry plans are only relevant if [Banuelos] was first not found to pose an unreasonable risk of danger to public safety." In his motion, Banuelos did not offer any new facts or circumstances other than those related to his admission into the Cri Help residential treatment program.

Because there were sufficient facts for the trial court to find that Banuelos posed an unreasonable risk of danger to public safety without considering the Cri Help admission, and because Banuelos did not offer evidence regarding any other new facts or circumstances on the risks posed to public safety from his resentencing, the trial court did not abuse its discretion in denying the motion.

Moreover, the party moving for reconsideration must provide a satisfactory explanation for the failure to produce the new or different facts at an earlier time. (*Shiffer v. CBS Corporation* (2015) 240 Cal.App.4th 246, 255.) Here, as the

trial court noted in its decision, there was no satisfactory explanation offered for why evidence of admission into a residential treatment program, such as that offered by Cri Help, was not offered at the hearing on the petition: the purported tentative ruling, which was made one year *prior* to the hearing, was not binding and, more critically, it "did not absolve counsel from presenting evidence [at the suitability hearing] as to permanent housing, prevention of future drug addiction (which is often a lifelong battle) and family support after leaving transitional housing."

Under these circumstances, we hold that the trial court did not abuse its discretion in denying the motion.

IV. Banuelos's ineffective assistance of counsel claim is premature

A. *Standard of review*

To prevail on a claim of ineffective assistance of counsel, defendant must establish her attorney's representation fell below professional standards of reasonableness and must affirmatively establish prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Hart* (1999) 20 Cal.4th 546, 623–624.) If the defendant's showing is insufficient as to one component of this claim, we need not address the other. (*Strickland*, at p. 697.)

However, "[a] claim on appeal of ineffective assistance of counsel must be rejected ' "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply

could be no satisfactory explanation." ' [Citations.] Unless the record affirmatively discloses that counsel had no tactical purpose for his act or omission, 'the conviction will be affirmed and the defendant relegated to habeas corpus proceedings at which evidence dehors the record may be taken to determine the basis, if any, for counsel's conduct or omission.'" (*People v. Hinds* (2003) 108 Cal.App.4th 897, 901.)

As our Supreme Court observed in *People v. Mendoza Tello* (1997) 15 Cal.4th 264 (*Mendoza Tello*), "[b]ecause claims of ineffective assistance are often more appropriately litigated in a habeas corpus proceeding, the rules generally prohibiting raising an issue on habeas corpus that was, or could have been, raised on appeal [citations] would not bar an ineffective assistance claim on habeas corpus." (*Id.* at p. 267.) In *Mendoza Tello*, the Supreme Court unanimously reversed the Court of Appeal's reversal of the defendant's conviction on the grounds that counsel was ineffective for failing to make a suppression motion; the court did so due to gaps in the record: "On this record, we do not know what [the deputy] would have said had he been asked at a suppression hearing why he did what he did . . . . [P]erhaps he did have a reason, of which defense counsel was aware, and which justified counsel's actions. Perhaps there was some other reason not to suppress the evidence." (*Ibid.*) "No one gave [the deputy] the opportunity to point to any specific and articulable facts justifying his actions. Nor did the

prosecution have the opportunity to offer some other possible reason not to suppress the evidence." (*Ibid.*)

The lesson from *Mendoza Tello*, *supra*, 15 Cal.4th 264, is that an appellate court should not reverse "unless it can be truly confident all the relevant facts have been developed." (*Id.* at p. 267.) Or, as the court in *People v. Hinds*, *supra*, 108 Cal.App.4th 897, put it, "[w]e are wary of adjudicating claims casting aspersions on counsel when counsel is not in a position to defend his conduct. A claim of ineffective assistance of counsel instead is more appropriately made in a habeas corpus proceeding." (*Id.* at p. 902.)

B. *The record is too undeveloped to support direct appellate review*

Here, we decline to review Banuelos's ineffectiveness of counsel claim because the record does not contain a full explanation for his counsel's conduct, or necessarily rule out a satisfactory one.

Banuelos argues that in reliance of the trial court's tentative ruling in May 2014, his counsel "abandoned any efforts to provide a 're-entry' program for appellant, believing such planning to be irrelevant as appellant would be spending a year in a drug program upon and/if release[d]." However, it is unclear from the record before us whether Banuelos's counsel did in fact abandon his search for a treatment program. On May 16, 2014, after the tentative ruling, Banuelos's counsel sent a letter to Banuelos, stating, "[The court] wants to have you placed in a

live in drug program for one year. There may be some good out of that, since it is obvious that all of you [sic] felony matters arose from a drug problem. *I am going to find a program for you, as close to Culver City as possible*."[8] (Italics added.) Based on this letter, it appears that Banuelos's counsel, far from abandoning the search for a treatment program, was committing himself to carrying out such a search, thus raising the possibility that no evidence of a suitable program was introduced at the hearing on the petition because, at that time, his counsel had not been able to find and/or secure Banuelos's admission into a suitable program. As a result, what is missing from the record is evidence about what Banuelos's counsel did and did not do following the May 2014 tentative ruling.

"Action taken or not taken by counsel at a trial is typically motivated by considerations not reflected in the record. It is for this reason that writ review of claims of ineffective assistance of counsel is the preferred review procedure. Evidence of the reasons for counsel's tactics, and evidence of the standard of legal practice in the community as to a specific tactic, can be presented by declarations or

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[8] In the declaration that he submitted in support of the motion for reconsideration, Banuelos's counsel discussed two other programs besides Cri Help, but it is unclear from the declaration whether his counsel acquired his information about these programs as a result of the search he promised to undertake for his client in May 2014 or as a result of something else.

other evidence filed with the writ petition." (*In re Arturo A.* (1992) 8 Cal.App.4th 229, 243.)

Accordingly, we affirm "without prejudice to any rights [Banuelos] may have to relief by way of a petition for writ of habeas corpus." (*People v. Garrido* (2005) 127 Cal.App.4th 359, 367.)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.